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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 235

CHICAGO & SOUTHERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

RESORT AIRLINES, INC., *Intervener.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH SUPPORTING BRIEF.

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———————, 1950.

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Chicago and Southern Air Lines, the petitioner below, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on May 8, 1950, in so far as said order dismissed the petition for review and denied judicial review of the contentions advanced by petitioner in Points 4 and 5 of its petition for review (R. 47-49).[1]

[1] Petitioner accepts the order in so far as it denied judicial review of the other contentions advanced by petitioner in Points 1, 2, 3 and 6 of its petition for review.

OPINIONS BELOW.

The decision of the Civil Aeronautics Board which petitioner sought to review in the United States Court of Appeals for the District of Columbia Circuit is set forth at pages 36-43 of the record. The per curiam order of the United States Court of Appeals for the District of Columbia Circuit dismissing the petition for review is set forth at pages 71-72 of the record and was not accompanied by any opinion.

JURISDICTION.

The per curiam order of the United States Court of Appeals for the District of Columbia Circuit was entered on May 8, 1950 (R. 72). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

The pertinent statutory provisions are cited in Appendix A, *infra*, pages 23-24.

QUESTION PRESENTED.

This case presents a single question: whether the holding of this Court in the case of *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation*, 333 U. S. 103 (1948) that the issuance of a certificate of public convenience and necessity by the Civil Aeronautics Board in the field of foreign air transportation is immune from judicial review once Presidential approval thereto had been given, extends to a situation where in the issuance of such a certificate the Board and the President have transgressed the express provisions of the Civil Aeronautics Act and ignored the statutory scheme established by Congress in that Act.[2]

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[2] Hereinafter the Civil Aeronautics Act will be referred to as the "Act."

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SUMMARY STATEMENT OF MATTER INVOLVED.

The intervener, Resort Airlines, Inc., applied to the Civil Aeronautics Board for a certificate of public convenience and necessity authorizing it to engage in a limited and specialized form of air transportation generally described as sky cruises and designed to exploit vacation or pleasure travel through the medium of all-expense air tours. The application of Resort was consolidated for hearing with a similar application filed by American Air Export and Import Company (hereinafter referred to as AAXICO) and assigned for hearing before an Examiner of the Board on October 29, 1947. Various existing certificated air carriers, including petitioner, were permitted to intervene in opposition. Hearings were held and the Examiner's Report was issued on August 19, 1948, recommending the issuance of a certificate to Resort. (R. 11-12) After receiving briefs and hearing oral argument, the Board on January 31, 1949, adopted an opinion and order (R. 22-35), in which it found that the applications of Resort and AAXICO were not required by public convenience and necessity and should be denied in their entirety. Having concluded that public convenience and necessity did not require the air transportation proposed by Resort and AAXICO, the Board made no finding as to whether either Resort or AAXICO was fit, willing or able to render such transportation within the meaning of Section 401(d)(1) of the Act (52 Stat. 987, 49 U. S. C. 481).

Inasmuch as these applications included requests to engage in overseas and foreign air transportation, the Board on February 1, 1949, in accordance with Section 801 of the Act (52 Stat. 1014, 49 U. S. C. 601) submitted its decision to the President for approval. Thereafter, the President advised the Board that "for reasons affecting our relations with foreign countries and in the interest of our national security, it is desirable and proper that Resort Airlines, Inc. be granted temporary authority to engage in foreign and overseas air transportation substantially in accord

with the recommendation of the Examiner." (R. 41) The record does not indicate on what possible basis the operation of all-expense air tours could be considered as "affecting our relations with foreign countries" or as being "in the interest of our national security." However, on June 1, 1949 the Board complied with the President's direction and issued an opinion and order granting Resort a temporary certificate of public convenience and necessity authorizing it to engage in foreign and overseas air transporfation limited to all-expense tours between certain points in the United States and certain points in foreign countries and United States possessions, including points already being served by petitioner (R. 42-43). The opinion and order of the Board contained no finding as to the "fitness, willingness and ability" of Resort as required by Section 401(d)(1) of the Act. This order was approved by the President on June 9, 1949. (R. 43)

On August 8, 1949, petitioner filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit in accordance with Section 1006(a) of the Act (52 Stat. 1024, 49 U. S. C. 646). (R. 45-61). Resort was permitted to intervene. (R. 61) In the petition for review, petitioner contended that the President had exceeded the authority delegated to him by Congress under Section 801 of the Act in two respects: (1) in specifying the particular carrier to render the air transportation which he considered to be in the national interest, and (2) in designating such carrier without the benefit of a finding by the Board as to the "fitness, willingness and ability" of that carrier to render such air transportation. Petitioner further contended that the Board has failed to comply with its statutory duty in not making any finding as to the "fitness, willingness and ability" of Resort before issuing the certificate to Resort as directed by the President (R. 47-49). On October 20, 1949 respondent, Civil Aeronautics Board, moved to dismiss the petition for review or, in the alternative, to affirm the Board's order forthwith (R. 61-63). Re-

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spondent urged in its motion to dismiss that the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation*, 333 U. S. 103 (1948) completely immunized from judicial review the contentions advanced by petitioner in its petition for review. On November 19, 1949, the intervener, Resort Airlines, also moved to dismiss the petition for review (R. 63-65).[3] On January 18, 1950, the United States Court of Appeals for the District of Columbia entered a per curiam order granting respondent's motion to dismiss and dismissing the petition for review (R. 65-66). The per curiam order was not accompanied by any opinion and assigned no reasons for the action taken. On January 26, 1950, petitioner filed a petition for rehearing and reconsideration or for clarification (R. 66-70). On May 8, 1950, the Court of Appeals denied the petition for rehearing and reconsideration but amended its order of January 18, 1950 to indicate that its action in granting respondent's motion to dismiss and in

[3] The intervener also moved to dismiss on the ground that although the petition for review had been filed within 60 days of the date of the President's approval of the Board's order, it had not been filed within 60 days after the "entry" of the order by the Board as required by Section 1006(a) of the Act, and for the further reason that petitioner had not urged before the Board its objections as to invalid exercise of power by the President and the Board as required by Section 1006(e) of the Act. The respondent joined in the latter objection. Neither of these objections was considered by the court below (R. 72). However, the respondent and intervener may seek to reassert these objections in answer to this petition. In the court below, petitioner answered these objections by showing: (1) that since the Board is prohibited under Section 801 from publishing its final order until Presidential approval has been obtained, the 60-day appeal period cannot begin to run until Presidential approval has attached; (2) that until the President and the Board had finally acted, petitioner could not have objected to their invalid exercise of power and failure to comply with the statutory scheme and that thereafter petitioner's only recourse was to seek judicial review; and (3) that in any event, in the unusual circumstances prevailing here, petitioner had "reasonable grounds" within the meaning of Sections 1006(a) and 1006(e) of the Act for failure to comply with the precise requirements of these sections.

dismissing the petition for review was based upon *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation, supra.* (R. 72)

REASONS FOR GRANTING THE WRIT.

1. The order of the United States Court of Appeals for the District of Columbia Circuit in denying judicial review of alleged invalid exercise by the President of delegated Congressional power creates a fundamental conflict between the constitutional power of Congress over foreign commerce and the constitutional power of the President over foreign affairs, which conflict can only be resolved by the issuance of a writ of certiorari and a decision by this Court.

2. The United States Court of Appeals for the District of Columbia Circuit has misinterpreted the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation, supra,* and has erroneously extended the immunity from judicial review granted by that decision to a situation not contemplated and, in fact, inferentially excepted in that case.

3. The order of the United States Court of Appeals for the District of Columbia Circuit granting the motion to dismiss renders unconstitutional the delegation of Congressional power to the President in the Civil Aeronautics Act and, to that extent, is in conflict with the recent decision of the United States District Court for the District of Columbia sitting as a statutory three-judge court in the case of *Colonial Airlines* v. *Adams, et al.,* 87 Fed. Supp. 242 (1949).

4. The order of the United States Court of Appeals for the District of Columbia Circuit dismissing the petition for review has decided questions of general importance and substance relating to the construction and application of the Civil Aeronautics Act not heretofore decided by this Court, such questions including:

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a. Whether the Board may ignore precise statutory requirements established by Congress and be immune from judicial review?

b. Whether the President in exercising delegated Congressional power may ignore the standards established by Congress and be immune from judicial review?

c. Whether the President may exercise power in excess of that delegated to him by Congress and be immune from judicial review?

ARGUMENT AND BRIEF.

1. The issuance of a writ of certiorari is necessary to resolve a fundamental conflict between the power of Congress over foreign commerce and the power of the President over foreign affairs.

The Civil Aeronautics Act of 1938 represents a comprehensive scheme for the regulation of air transportation and was enacted by Congress in the exercise of its constitutional power over foreign and domestic commerce. The Act provides that no one may engage in air transportation unless possessed of a certificate of public convenience and necessity issued by the Board, and further provides that the Board may not issue any such certificate unless it makes the requisite statutory findings of public convenience and necessity and of fitness, willingness and ability as set forth in Section 401 of the Act. Congress recognized the necessity of coordinating its power over foreign commerce with the President's constitutional power over foreign affairs. Accordingly, in Section 801 of the Act it delegated to the President a portion of its constitutional power and subjected to Presidential approval the issuance or denial of all certificates authorizing foreign air transportation. So much is clear from the Act itself. However, it does not follow from this that the Board and the President may ignore the statutory scheme established by Congress in matters affecting foreign air transportation. Nor

does it follow that judicial review is not available to determine whether in fact the Board and the President have ignored the statutory scheme. If judicial review is not available, then the President may resolve in his own favor any conflict between his power over foreign affairs and Congress' power over foreign air commerce, and the Board instead of being the creature of Congress to carry out its policy and purpose as set forth in the Act becomes the agency of the Executive. The issuance of the writ requested here is the first step leading to the ultimate determination of these important questions. Without the writ, the question of judicial reviewability is foreclosed. Without judicial review, the resolution of the conflict between Congressional and Presidential power is foreclosed.

2. The Court of Appeals for the District of Columbia Circuit has misinterpreted and misapplied the decision of the Supreme Court in the Waterman Case.

It is clear from the order dismissing the petition for review that the Court of Appeals for the District of Columbia Circuit was of the opinion that the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation, supra,* completely immunizes from judicial review *any* action by the Civil Aeronautics Board and the President in the issuance of a certificate authorizing a carrier to engage in foreign air transportation. The *Waterman Case* was the only reason cited for dismissing the petition for review.[4] Since the factual situations in the *Waterman Case* and in the instant case are so different, it is imperative that a writ of certiorari issue so that this Court may declare that by its decision in the *Waterman*

[4] The order dismissing the petition for review states that the Court took judicial notice "that H.R. 5771, 80th Cong. 2d Sess., died in Committee." However, the order does not indicate what effect this had upon the court's reasoning, if any. In any event, the fact that a particular piece of legislation was introduced or failed of passage or "died in Committee" is of no legal significance here.

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Case it did not intend to immunize from judicial review *any and all action* by the Board and the President in the issuance of a certificate covering foreign air transportation, particularly where the Board and the President have violated the express provisions of the Act or exceeded the power conferred upon them by Congress.

The *Waterman Case* was decided by this Court in 1948 by the narrow margin of a five to four decision. In that case the Civil Aeronautics Board had rendered a decision in which it found: (a) that public convenience and necessity required the certification of a carrier to engage in foreign air transportation in the Caribbean area, and (b) that Chicago and Southern Air Lines was fit, willing and able to engage in such transportation, both of which findings are statutory findings required by Section 401 of the Act. This decision was submitted to the President for approval in accordance with Section 801 of the Act and his approval was obtained. Waterman Airlines, a rival applicant for the routes, petitioned for judicial review and this Court held, when the matter was finally presented to it, that the valid exercise of the President's discretionary power under Section 801 of the Act was immune from judicial review. In that case no question was raised by Waterman as to any failure by the Board to make the requisite statutory findings, nor was any question raised as to the legality of the action of the President in approving the Board's decision. Even so, this Court divided five to four on the question of judicial reviewability.

The instant case presents a different situation. Here the Board and the President exceeded the authority vested in them by Congress under the Act. Here the Board acted illegally in issuing a certificate to Resort without having first made a determination as required by Section 401 of the Act as to the fitness, willingness and ability of Resort to engage in air transportation. Here the President exceeded the power delegated to him by Congress in Section 801 of the Act in specifically directing the Board to issue

a certificate to Resort (instead of leaving it to the Board to determine whether Resort or AAXICO should be certificated to provide the air transportation deemed by the President to be in the national interest) and in directing the Board to issue a certificate to Resort without the benefit of a recommendation from the Board as to the fitness, willingness and ability of Resort to engage in such air transportation. This presents an entirely different situation from that presented in the *Waterman Case.*[5]

The difference between the two cases was apparently anticipated by the majority opinion of this Court in the *Waterman Case.* In one of the opening sentences of his majority opinion in the *Waterman Case,* Mr. Justice Jackson stated as follows:

> "*By proceedings not challenged as to regularity,* the Board, with express approval of the President, issued an order which denied Waterman Steamship Corporation a certificate of convenience and necessity for an air route and granted one to Chicago & Southern Air Lines, a rival applicant." 333 U. S. 105. (Italics supplied)

This language infers that the majority opinion expressly reserved for a future time the question whether irregularities committed by the Board or the President in the is-

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[5] Petitioner is particularly well aware of these differences inasmuch as petitioner was an active participant in the *Waterman Case.* It was petitioner which carried the *Waterman Case* to this Court and successfully urged upon this Court that the issuance of a certificate of public convenience and necessity in foreign air transportation is immune from judicial review in a situation where the Board complied with the statutory scheme established by Congress in the Act, and where the recommendations made by the Board to the President were approved by him in the valid exercise of his powers under Section 801 of the Act. Petitioner is not now seeking to avoid in this proceeding the rule of law resulting from its successful prosecution of the *Waterman Case.* Petitioner believes that the rule of law established in the *Waterman Case* is the correct one under the factual situation, issues and contentions there involved. The instant proceeding, however, involves a different factual situation and presents different issues.

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suance of a certificate involving foreign air transportation are subject to judicial review. In his dissenting opinion, Mr. Justice Douglas (joined in by Mr. Justice Black, Mr. Justice Reed and Mr. Justice Rutledge) stated as follows:

> "Today a litigant tenders questions concerning the arbitrary character of the Board's ruling. *Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision. Thus the purpose of Congress is frustrated.*" 333 U. S. 117 (Italics supplied)

The dissenting Justices undoubtedly anticipated a future case where legal irregularity might be involved and feared that even in such a case judicial review would be denied under the rationale of the majority opinion. It seems reasonable to assume, therefore, that the phrase "by proceedings not challenged as to regularity" was inserted by Mr. Justice Jackson in the majority opinion to lay at rest the misgivings of the four dissenting Justices and to make it perfectly clear that the law of the *Waterman Case* was not as broad in scope as the dissenters feared and that the majority expressly reserved for future decision in an appropriate case the question whether immunity from judicial review attached to invalid exercise of power by the Board and by the President. It is such a case that petitioner now presents.

Since the decision in the *Waterman Case*, there has been considerable debate as to the full scope, meaning and effect of that decision.[6] Does the *Waterman Case* mean that the

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[6] The importance of the decision of the Supreme Court in the *Waterman Case* and the serious questions posed by the decision as to the scope of immunity from judicial review provided therein is evidenced by the large number of legal articles which have been written commenting on this decision and its possible scope, including the following: 61 Harvard Law Review 1053 (1948); 43 Illinois Law Review 693 (1948); 32 Minnesota Law Review 811 (1948); 17 Journal Bar Ass'n., Kansas 241 (1948); 15 Journal of Air Law, Northwestern 474 (1948); 47 Columbia Law Review 1081 (1947).

Board and the President have an absolutely free hand in the award of certificates involving foreign air transportation? Can they ignore the mandatory requirements of the Act as established by Congress? Are there any limits on their immunity from judicial review and, if so, what are these limits? Did this Court in the *Waterman Case* intend that the constitutional power of Congress over foreign commerce should be completely subservient to the President's power over foreign affairs? Did this Court mean that the President in exercising his delegated power over foreign commerce under Section 801 of the Act could ignore the standards prescribed by Congress in Section 401? At present neither the President, the Board nor the air transport industry has any clear understanding on these vital questions. All that can be said with certainty under the *Waterman Case* is that a decision of the Civil Aeronautics Board arrived at after notice and hearing and in full compliance with procedural due process and supported by the necessary statutory findings of (a) public convenience and necessity, and (b) of fitness, willingness and ability, awarding a certificate in foreign air transportation is not subject to judicial review once the decision of the Board has been approved by the President in the valid exercise of his delegated and discretionary power under Section 801. The instant case is the first to come before this Court since the *Waterman Case* which presents a situation where the Board did *not* make the necessary statutory findings and where the President *invalidly* exercised the powers conferred on him by Section 801, and exercised powers in *excess* of those conferred by Section 801.[7]

[7] As will be shown below, the Government has, until this case arose, consistently construed the *Waterman Case* as not precluding judicial review of failure to comply with statutory requirements of law and procedure.

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3. The action of the Court of Appeals for the District of Columbia Circuit denying judicial review compels the conclusion that the delegation of Congressional power to the President in the Civil Aeronautics Act is unconstitutional. As such, the action of the Court is inconsistent with a decision by a three-judge statutory court in the same Circuit.

A further reason for granting the writ of certiorari is provided by the conflict between the order of the court below and the recent decision of the United States District Court for the District of Columbia sitting as a statutory three-judge court in the case of *Colonial Airlines* v. *Adams, et al.*, 87 Fed. Supp. 242 (1949). In the latter case, which involved the constitutionality of Sections 402 and 801 of the Act, the exact meaning and effect of this Court's holding in the *Waterman Case* became important. The constitutional question turned on whether the delegation to the President in Section 801 of the Act of a portion of Congress' power over foreign commerce had been accompanied by adequate standards in Section 402 of the Act.[8] In sustaining the constitutionality of the disputed sections, the majority opinion in the *Colonial Case* held that the standards provided by Section 402, including the standard of "fitness, willingness and ability," were mandatory and not merely permissive, otherwise the delegation by Congress to the President in Section 801 would be unconstitutional. The dissenting opinion, however, interpreted the *Waterman Case* as holding that the President is not bound by the standards imposed by Congress in Section 402, since he may disregard them without fear of judicial review. From this it concluded that Section 402 did not provide suitable standards and was, therefore, unconstitutional.

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[8] Section 402 of the Act relates to the issuance of permits to foreign air carriers and is substantially the same as Section 401 relating to the issuance of certificates to domestic air carriers. Both sections require the Board to find that the carrier seeking the permit or certificate is "fit, willing and able" to engage in the air transportation applied for.

The conflict between the action of the Court of Appeals in the instant case and the decision in the *Colonial Case* is clear. In the instant case the Court of Appeals has extended the *Waterman Case* to hold that judicial review may not be had where the standard of "fitness, willingness and ability" has not been complied with. In the *Colonial Case* the opposite assumption forms the basis of the majority opinion, which holds that compliance with the "fitness, willingness and ability" standard established by Congress is mandatory and that the finding of "fitness, willingness and ability" must be had *before* the President acts. If the Court of Appeals in the instant case is correct, then it follows that the Court in the *Colonial Case* was wrong in basing its finding as to the constitutional issues presented on the mandatory nature of the standards established by Congress.

The intra-circuit conflict resulting from the decision of the Court of Appeals in the instant case and the decision of the statutory three-judge court in the *Colonial Case*[9] can only be resolved by a writ of certiorari by this Court.

4. In the Waterman Case the Solicitor General conceded that judicial review might be had under circumstances analogous to those presented here.

In his Brief to this Court in the *Waterman Case*, the Solicitor General of the United States did not urge that blanket immunity from judicial review extended to all cases involving Presidential approval of certificates in foreign air transportation. He, as well as petitioner, merely contended that immunity from judicial review extended to the valid exercise of the President's discretionary power and this Court so held. The Solicitor General in the *Waterman Case* conceded that an appropriate case might arise where

[9] The *Colonial Case* having been decided by a statutory three-judge court was not subject to review by the Court of Appeals. It was appealed to the Supreme Court but the appeal was ultimately withdrawn. 94 L. Ed. 374 (1950).

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judicial review might be had and cited examples startlingly similar to the situation here presented:

> "While the exercise of the President's discretionary power is not subject to judicial review, there remains the question whether any other elements of the joint President-Board action are properly reviewable by the courts.
>
> "In Section 401 of the Civil Aeronautics Act, Congress has imposed various conditions precedent to the issuance of certificates of public convenience and necessity. Public notice of the filing of an application for such a certificate must be given by the Board, and the application may be determined only after a public hearing. Section 401 (c). Also, Section 401 (f) contains affirmative and negative requirements as to the terms and conditions to be contained in any certificate, which may be issued under that section. It requires, *inter alia*, that American carrier certificates for foreign air transportation must permit the handling of foreign mail. Again the certificates may not restrict the right of the carrier 'to add to or change schedules'. If Section 1006(a) is construed as evidencing a Congressional purpose to provide for review, so far as practicable, of joint President-Board orders relating to certificates for overseas or foreign air transportation, then these are matters which are capable of judicial scrutiny to ascertain whether there has been compliance with the statutory requirements.
>
> "To summarize our views: the President's discretionary powers under Section 801 are not reviewable. Questions as to the adequacy of evidence to support the Board's findings and conclusions do not present reviewable issues. The Board's compliance with such statutory requirements as notice and hearing may be reviewable, together with outright questions of law such as would be involved in the Board's failure to comply with the requirements of Section 401 (f)."
> Government's Brief in *Waterman Case*, pp. 52-53.

The foregoing position has been consistently followed by the Government in every case since the *Waterman Case* until the present one.[10]

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[10] For example, in *Seaboard & Western Airlines, Inc.* v. *C.A.B.*, 181 Fed. (2d) 777 (1949), the Government's Brief to the Court of Appeals for the District of Columbia Circuit construed the decision of this Court in the *Waterman Case*, as follows (p. 15):

> "In the *Waterman* case the Supreme Court held that 'orders of the Board as to certificate for overseas or foreign air transportation are not mature and are therefore not susceptible to judicial review at any time before they are finalized by Presidential approval' and that 'after such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate' (333 U.S. at p. 114). It seems clear, however, that the Court was not passing upon the question whether the Board's compliance with legal and procedural requirements of the statute were subject to review. It put these questions aside at the outset by stating that the orders of the Board arose 'by proceedings not challenged as to regularity' (333 U.S. at p. 105).
>
> "Seaboard argues that this language was purely descriptive and has no particular significance. It points to the language of the dissenting opinion which, recognizing that no question of procedural irregularity was before the Court, states that 'tomorrow' such questions may arise and the Board's action will not be subject to correction by the Courts (333 U.S. at p. 118) (Reply to Respondent's Objections to Petition for Stay of Proceedings, filed April 14, 1949, pp. 13-15). It is possible to construe the Court's decision in the *Waterman* case either as refusing to pass upon an issue that was not before it, or as intimating that procedural irregularities in orders approved by the President could not be judicially reviewed. We think that the position of the Board before the Court in the *Waterman* case requires the adoption of the former construction.
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> • • • • • •
>
> "Since the Board did not contend that approval of one of its orders by the President insulated such order from review for procedural or legal irregularities, and since the orders before the Court arose 'by proceedings not challenged as to regularity,' as the Court stated, we submit that the *Waterman* case does not purport to determine whether an order of the Board approved by the President may be reviewed in the courts for procedural irregularities. While the *Waterman*

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The striking similarity between the argument advanced by the Government in the *Waterman* and *Seaboard Cases* and the argument advanced by petitioner in the instant case is readily apparent. Petitioner here urges nothing more or different than was urged by the Government in the *Waterman Case* as noted above. If the Government is consistent, it will be supporting and not opposing the issuance of the writ requested herein. As recently as July 13, 1950, the Government conceded that an illegal order issued by the Civil Aeronautics Board was subject to review by the courts even though such illegal order had been approved by the President under Section 801:

> "If the Board's original decision could not lawfully be submitted to the President under 49 U.S.C. 601, and, as plaintiffs contend, any subsequent order of the Board would necessarily be illegal, then any such subsequent order would also be outside the exceptions to the judicial review provisions of the Act (49 U.S.C. 646) as interpreted by the *Waterman* case."
>
> Government's Supplemental Memorandum in support of motion to dissolve temporary restraining order, *Seaboard & Western Airlines, Inc., et al.* v. *Oswald Ryan, et al., Members of the Civil Aeronautics Board,* Civil Action 2989-50, U. S. District Court, D. C.

The inclusion by Mr. Justice Jackson in his majority opinion in the *Waterman Case* of the phrase "by proceed-

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case does not preclude such review,[10] the cases under the Tariff Acts referred to above would seem to permit it.[11] * * *"

"[10] The situation appears to be that the four dissenting justices in the *Waterman* case would permit such review, and that the five justices representing the majority have not expressed themselves on the question."

"[11] See also, for example, *Perkins* v. *Elg*, 307 U.S. 325, 350 (1939), where the Supreme Court reversed the Secretary of Labor's determination of a legal question as to the citizenship of an applicant for a passport, although it professed to have no power to interfere with the 'discretion' of the Secretary of State to grant or withhold the passport."

ings not challenged as to regularity" undoubtedly indicated his acceptance of the Government's contention that judicial review might be had in a case where legal or procedural irregularities were involved, notwithstanding Presidential approval. Petitioner sought to present such a case in the court below but found itself confronted with the Government no longer maintaining the position it advanced in the *Waterman Case* and instead contending that the procedural and legal irregularities alleged by petitioner are immune from judicial review, citing the *Waterman Case* as authority for this proposition. A writ of certiorari should issue to provide this Court an opportunity to pass upon an important case of first impression, one "challenged as to regularity."

CONCLUSION.

The issues which petitioner has raised in its petition for review are of far-reaching importance. They require judicial definition of the scope of the President's authority under Section 801 of the Civil Aeronautics Act. They require judicial delineation of the constitutional power of Congress over foreign commerce as expressed in the Civil Aeronautics Act and of the President's constitutional power over foreign affairs. They require judicial determination of the extent which the President in purportedly exercising his constitutional power over foreign affairs can usurp, override or disregard the power delegated to the Civil Aeronautics Board by Congress to determine what carriers are fit, willing and able to engage in air transportation. They raise questions as to the constitutionality of Sections 401 and 801 of the Act if the failure by the President and the Board to comply with Congressional standards is not judicially reviewable. The court below has held that the decision of this Court in the *Waterman Case* precludes a determination of any of these issues by the judiciary. The District Court in the same circuit in a decision not subject to review by the court below has held to the contrary.

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The importance of air transportation to foreign and domestic commerce, to the national defense and to the Postal Service has been recognized by Congress in Section 2 of the Civil Aeronautics Act. As this Court stated in the *Waterman Case* (333 U. S. 108) air transportation has "burst suddenly upon modern governments offering new advantages, demanding new rights and carrying new threats." For that reason, it is essential that the respective powers of Congress and the President in the development of foreign air transportation be clearly delineated and that the scope of the President's power in approving or disapproving recommended decisions by the Civil Aeronautics Board be clearly defined.

WHEREFORE, petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this Cause directed to the United States Court of Appeals for the District of Columbia Circuit and upon such review the order of said Court of Appeals for the District of Columbia Circuit be vacated, reversed and set aside, and that this case be remanded to said Court with instructions to proceed further in accordance with the views of this Court.

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NOTE: Addendum beginning on page 20.

ADDENDUM.

Since the printing of the foregoing portion of this petition, certain matters have arisen which emphasize the importance of this case and the need for a clear definition by this Court of the scope of its decision in the *Waterman Case* and the extent to which judicial review is available to correct invalid exercise of Presidential and Board power. On July 20, 1950, petitions for review and for stay were filed in the United States Court of Appeals for the Second Circuit in two separate actions challenging the legality of various orders issued by the Civil Aeronautics Board and approved by the President in the widely discussed Pan American-American Overseas Merger Case; *Trans-World Airlines* v. *The Civil Aeronautics Board, et al., Civil Action No.* ——— and *Brian O. Sparks, et al* (*employees of American Overseas Airlines*) v. *The Civil Aeronautics Board,* Civil Action No. 21728. In each of these cases the petitioners allege that the orders issued by the Board and approved by the President related to a subject matter which was not subject to Presidential approval under Section 801 of the Act and that the Board should not have submitted to Presidential direction and control in the issuance of such orders. Notwithstanding the fact that counsel for the Government on repeated occasions has taken the position in various courts that the *Waterman Case* would not preclude judicial review of alleged legal or procedural irregularities (*supra,* pp. 15-17), in the objections filed by the Government on July 26, 1950, in the Second Circuit in opposition to the petitions for stay, the Government now contends that the *Waterman Case* precludes judicial review once Presidential approval has attached, even in the case where Presidential review and approval is not authorized by the Act, and to support this contention cites the order of the court below in the instant case:

> "The Petition for a stay and other interlocutory relief should be denied because the order of the Board

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(Serial No. E-4410), the effectiveness of which Petitioner seeks to stay, is not within the jurisdiction of this Court to review. The order was entered by the Board at the direction of the President, pursuant to section 801 of the Civil Aeronautics Act, as amended, (49 USC 601). The Supreme Court held in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corporation*, 333 U. S. 103, that orders entered at the direction of the President in this fashion 'embodied Presidential discretion as to political matters beyond the competence of the courts to adjudicate.' (333 U. S. at p. 114.)"

* * * * *

"Only recently, on facts not unlike those at bar, this procedure received the express sanction of the Court of Appeals for the District of Columbia Circuit. *Chicago and Southern Air Lines* v. *Civil Aeronautics Board*, App. D. C. No. 10375, petition for review dismissed May 8, 1950. In that case the Board submitted an opinion and order to the President recommending denial of two applications to engage in foreign air transportation. The President advised the Board that he believed such air transportation to be required in the interests of the United States and directed the Board to certificate one of the two applicants. The Board complied with this directive. A competitor of the newly certificated carrier challenged the President's action as being beyond the scope of his authority under section 801 of the Act, and contended that the President should have required the Board to submit a recommendation with respect to the carrier to be authorized to perform the services the President thought desirable. The Court of Appeals granted the Board's motion to dismiss the petition for review 'on the authority of *Chicago and Southern Air Lines* v. *Waterman Steamship Co.*, 333 U. S. 103'. It is perfectly clear therefore that the *Waterman* case requires the conclusion that the President has authority, once a case is submitted to him, to direct the Board to take such action with respect to an application as he deems appropriate." (Objections to Petitioner's Motion for Stay, pp. 6, 10-11).

Thus we find that whereas the Government as recently as July 13, 1950, conceded in argument before the District Court for the District of Columbia that an order of the Board issued illegally could be reviewed judicially notwithstanding the *Waterman Case* (*supra*, p. 17), less than two weeks later and on July 26, 1950, in proceedings before the Court of Appeals for the Second Circuit involving the same parties and the same subject-matter, the Government took just the opposite position.

If for no other reason, this Court should issue the writ of certiorari in order to resolve all further doubt as to the scope of its decision in the *Waterman Case*. Legal or procedural irregularities committed by the President or the Board in proceedings involving foreign air transportation are either reviewable by the courts or they are not. No persuasive resolution of the question can be expected short of a final decision by the Supreme Court. Issuance of the writ requested herein will provide that opportunity.

It cannot be predicted at this time what disposition the Court of Appeals for the Second Circuit will make of the cases pending there or whether its action will be in conflict with the order of the Court of Appeals for the District of Columbia Circuit granting the motion to dismiss in the instant case. However, the very existence of these cases in the Second Circuit and the broad and sweeping claims of immunity from judicial review now being made by the Government in reliance upon the *Waterman Case* demonstrate the great public importance of the basic jurisdictional question presented here. The determination of this question is of importance not only to petitioner but also to other important units in the air transport industry subject to governmental regulation.

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APPENDIX A.

Statutes Involved.

1. Section 401 of the Civil Aeronautics Act (52 Stat. 987, 49 U. S. C. 481):

"(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation."

* * * * *

"(d)(1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

2. Section 801 of the Act (52 Stat. 1014, 49 U. S. C. 601):

"The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof. * * *"

3. Section 1006 of the Act (52 Stat. 1024, 49 U. S. C. 646):

"(a) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act,

shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said 60 days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

* * * * *

"(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: PROVIDED, That no interlocutory relief may be granted except upon at least five days' notice to the Authority."

"(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code."

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